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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREENWOOD TRUST COMPANY,
Petitioner,

v.

JAMES HUNTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

REPLY BRIEF OF PETITIONER

ALAN S. KAPLINSKY
BURT M. RUBLIN
BALLARD SPAHR ANDREWS & INGERSOLL
1735 Market Street
51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

ARTHUR R. MILLER
(Counsel of Record)
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

Counsel for Petitioner

4 pp

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Petitioner Greenwood Trust Company ("Greenwood") submits this Reply Brief in support of its petition for a writ of certiorari.

Respondent James Hunter has filed a brief in which he states that he does not oppose Greenwood's petition, since he "recognizes that this case satisfies the Court's criteria for granting certiorari." (Respondent's Brief at pp. 1, 10). Indeed, as noted in respondent's brief, subsequent to the filing of Greenwood's petition, this Court granted certiorari in a case against a national bank involving the issue of whether credit card late charges are "interest" within the meaning of Section

85 of the National Bank Act, 12 U.S.C. §85. *Smiley v. Citibank (South Dakota), N.A.*, No. 95-860, 1996 U.S. LEXIS 700, 64 U.S.L.W. 3500 (Jan. 19, 1996).

This case involves Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d, which governs federally-insured state banks such as Greenwood. Just as the courts below have reached conflicting conclusions in national bank cases concerning whether late charges are "interest" under Section 85 of the National Bank Act, so too have the courts differed in their interpretations of Section 27 of the Federal Deposit Insurance Act. While the New Jersey Supreme Court held in this case that late charges are not "interest" under Section 27 of the Federal Deposit Insurance Act, in other cases brought against Greenwood the First Circuit Court of Appeals and Colorado Supreme Court held that late charges *are* "interest" for purposes of Section 27. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 974 (1993); *Stoorman v. Greenwood Trust Co.*, No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995).

Greenwood submits that Section 27 of the Federal Deposit Insurance Act should be construed *in pari materia* with Section 85 of the National Bank Act, since Congress incorporated into Section 27 the language used previously in Section 85 in order to create parity between federally-insured state banks and national banks. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d at 826-827. However, in the courts below the plaintiffs have attempted to draw distinctions between Section 27 and Section 85 based on: (a) the slight differences in language between the two statutes;[1] and (b) the fact that Section 27 originated as Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), and the legislative history of Section 501 of

1. Section 27 of the Federal Deposit Insurance Act has a clause that expressly preempts State constitutions and statutes, whereas Section 85 of the National Bank Act does not contain an express preemption clause. Plaintiffs have argued that common law challenges to late charges are outside the scope of Section 27's express preemption clause.

DIDA (codified as 12 U.S.C. §1735f-7a(a)(1)) shows that Congress did not intend the preemptive sweep of Section 501 to extend to late charges.

Although Greenwood does not believe that the plaintiffs' efforts to differentiate between Section 27 of the Federal Deposit Insurance Act and Section 85 of the National Bank Act have any validity, nonetheless it is concerned that even if this Court were to affirm the California Supreme Court's holding in *Smiley v. Citibank* that late charges are "interest" under Section 85, plaintiffs will seek to avoid that ruling in Section 27 cases by making the arguments discussed above. Thus, unless certiorari is granted in a Section 27 case to resolve the conflicts that now exist, there will undoubtedly be further uncertainty and litigation involving federally-insured state banks.

Counsel for Greenwood is cognizant of the expedited briefing schedule established by this Court in *Smiley v. Citibank*. Since Greenwood believes that this case should be briefed and argued at the same time as the *Smiley* case, if certiorari is granted in this case it will be prepared to submit its brief on the merits at the same time that Petitioner's brief in *Smiley* is due, namely, March 1, 1996.

Accordingly, Greenwood respectfully submits that its petition for a writ of certiorari should be granted to resolve the conflict in the courts below concerning Section 27 of the Federal Deposit Insurance Act.

Respectfully submitted,

ALAN S. KAPLINSKY
BURT M. RUBLIN
BALLARD SPAHR ANDREWS
& INGERSOLL
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Philadelphia, PA 19103-7599
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